SUPREME COURT, U.S.
FILED

(1)

96 976 DEC 17 1996

No. ——

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JOHN HUDSON, LARRY BARESEL, and
JACK BUTLER RACKLEY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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December 17, 1996

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

20 pp

QUESTIONS PRESENTED

1. Whether imposition upon petitioners of monetary fines as *in personam* civil penalties by the Department of the Treasury, together with other sanctions, is "punishment" for purposes of the Double Jeopardy Clause of the Fifth Amendment?

2. Whether such fines may be justified by reference to the "costs of investigation" allegedly incurred by the regulatory agency which assessed them when:

   (a) the statute pursuant to which the sanctions were assessed contains specific criteria for imposing fines and does not authorize consideration of "investigatory costs";

   (b) no agency of government contends it was a victim of the conduct for which fines were imposed; and

   (c) "costs of investigation" were not considered by the agency assessing the fines in determining whether to impose the fines or the amount thereof?

3. Whether the Court should grant review of the judgment below to resolve the express conflict between the opinion of the Tenth Circuit in this case and the opinion of the Seventh Circuit in *S.A. Healy Co. v. Occupational Safety and Health Review Commission*, 96 F.3d 906, 909-10 (7th Cir. 1996) with regard to the questions presented?

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

The petitioners, John Hudson, Larry Baresel and Jack Butler Rackley, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on August 8, 1996 of which rehearing was denied on September 20, 1996.

OPINIONS BELOW

The opinion of the court of appeals of which review is sought, *United States v. Hudson, ("Hudson II")* is reported at 92 F.3d 1026, and is reprinted in the appendix hereto, app., pp. 1a-8a.

The previous opinion of the court of appeals *("Hudson I")* is reported at 14 F.3d 536, and is reprinted at app., pp. 69a-81a.

The opinion of the district court dismissing the indictment against petitioners on the authority of *Hudson I*, is reported at 879 F. Supp. 1113 (W.D. Okla. 1995) and is reprinted at app., pp. 9a-14a. The previous opinion of the district court is unreported and is reprinted at app., pp. 82a-88a.

JURISDICTION

Petitioners [1] were indicted in the United States District Court for the Western District of Oklahoma for alleged misapplication of the funds of three Oklahoma banks, and for conspiracy to misapply such funds. Petitioners moved to dismiss the indictment on the ground that it was barred by the Double Jeopardy Clause of the Fifth Amendment in light of the previous imposition of monetary fines and other sanctions upon petitioners for the same alleged conduct. The district court denied petitioners' motions to dismiss, app., pp. 82a-88a. Petitioners timely appealed. The court of appeals affirmed the district court as to the non-monetary sanctions, but reversed and remanded for further proceedings as to the fines. *United States v. Hudson*, 14 F.3d 536 (10th Cir. 1994), app., pp. 69a-81a.

On remand, the district court, following an evidentiary hearing, granted petitioners' motions to dismiss the indictment. *United States v. Hudson*, 879 F. Supp. 1113 (W.D. Okla. 1995), app., pp. 9a-14a.

The government appealed. On August 8, 1996, a differently constituted panel of the court of appeals again reversed the district court and, on this occasion, ordered the indictment against petitioners reinstated. *United States v. Hudson*, 92 F.3d 1026 (10th Cir. 1996), app., pp. 1a-8a.

[1] All parties to this proceeding are shown in the caption.

Petitioners timely filed a petition for rehearing and a suggestion of rehearing *en banc* both of which the court of appeals denied on September 20, 1996. App., pp. 18a-19a.

The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).[2]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb". The statutory provisions involved are 12 U.S.C. §§ 93(b), 504 and 1818(e) and (i) and 18 U.S.C. §§ 371, 656, 1005 and 2. These provisions are reprinted at app., pp. 144a-199a.

STATEMENT OF THE CASE

A. The Administrative Sanction Proceedings Against Petitioners

In the early 1980's, John Hudson, an attorney and member of the Oklahoma bar, became chairman of the board and controlling shareholder of several small Oklahoma banks. Larry Baresel, Mr. Hudson's law partner, and Jack Butler Rackley became officers or directors of one or more of the banks acquired by Mr. Hudson.

In 1986 and 1987 the Department of the Treasury, through the Office of the Comptroller of the Currency ("OCC"), issued Reports of Examination ("ROA's") of the banks which Mr. Hudson controlled. The ROA's were highly critical of Mr. Hudson, Mr. Baresel and Mr. Rackley with regard to certain loans made by these banks which were alleged to have violated federal statutory proscriptions regarding "insider" or "nominee" lending.

[2] On November 5, 1996, the district court stayed all proceedings pending disposition of this petition for a writ of certiorari. App., pp. 15a-17a.

In 1989, OCC initiated two adversary proceedings against petitioners. In one proceeding, styled an "assessment of civil money penalty", OCC sought to impose "assessments" (fines) of $100,000 against Mr. Hudson and $50,000 each against Mr. Baresel and Mr. Rackley pursuant to 12 U.S.C. §§ 93(b) and 504. App., pp. 89a-98a. In the second proceeding, styled an "intention to prohibit further participation", OCC sought to prohibit petitioners from participating "in any manner" in the affairs of any financial institution having deposits insured under any program of federal deposit insurance pursuant to 12 U.S.C. § 1818(e) and (i). App., pp. 99a-128a.[3] Both types of penalties were assessed on account of petitioners' alleged personal violations of federal statutes prohibiting "insider" or "nominee" lending transactions. (*Id.*) The "notice of assessment of a civil money penalty" issued against petitioners stated that the money penalties against petitioners were being imposed "pursuant to 12 U.S.C. §§ 93(b) and 504 for asserted violations of 12 U.S.C. §§ 84 [and] 375(b)" and that the amount of the money penalties imposed had been determined based upon, *inter alia*, "the gravity of the violations [asserted against petitioners and] the history of previous violations. . . ." App., p. 89a.

The "notice of intention to prohibit further participation" issued against petitioners stated that it had been issued pursuant to 12 U.S.C. § 1818(e) because OCC was "of the opinion that [petitioners had] engaged in conduct or practice with respect to [designated federally chartered banking institutions] which resulted in substantial financial loss or other damage" to such financial institutions and had evidenced "personal dishonesty and a willful and continuing disregard for such banks' safety and soundness. . . ." App., pp. 99a-100a (Mr. Hudson);

[3] Certain provisions of these statutes have been amended since 1989. The amendments do not affect the questions presented for review.

pp. 109a-110a (Mr. Baresel); pp. 119a-120a (Mr. Rackley).

All sanctions imposed were, thus, based upon the asserted gravity and magnitude of petitioners' alleged violations of federal law and upon the amount of loss which OCC asserted these violations had caused the banking institutions involved. OCC did not assert any loss or injury to any agency of the government as a result of petitioners' alleged violations of law.[4]

Following negotiations with the government, petitioners, without admitting or denying any of the underlying allegations (app., pp. 29a-31a), consented to entry of orders requiring them to pay reduced fines and to not participate in any manner in the conduct of the affairs of any insured depository institution, savings association or credit union. App., pp. 129a-143a.[5]

B. The Indictment Of Petitioners And The Initial Opinion Of The District Court

In 1992, petitioners were indicted for the same alleged "insider" lending transactions. Petitioners moved to dismiss the indictment on the ground it was barred by the Double Jeopardy Clause of the Fifth Amendment. Petitioners asserted that the previous imposition of fines and non-participation sanctions precluded prosecution by indictment for the same transactions under *United States v. Halper*, 490 U.S. 435 (1989). The district court denied

[4] As discussed *infra*, the district court found as a fact that "injury to the government" was not "considered by OCC in considering the amount of the penalties to be imposed" upon petitioners. *United States v. Hudson*, 879 F. Supp. at 1115-16, app., pp. 13a-14a. That finding was neither challenged by the government nor disturbed by the court of appeals.

[5] There has been no challenge to the finding of the district court that the reduction in the amount of the fines imposed upon petitioners was not "related to an assessment of government losses." (*Id.*, at 1116, app., p. 14a).

the motions to dismiss in an unpublished order. App., pp. 82a-88a. Petitioners timely appealed.

C. The First Opinion Of The Court Of Appeals

In its first opinion considering petitioners' double jeopardy claims (*Hudson I*), the court of appeals agreed with the district court that the non-participation sanctions imposed upon petitioners did not constitute "punishment" for purposes of the Fifth Amendment. With regard to the monetary fines, however, the Tenth Circuit reached a different conclusion. *Hudson I* held that the monetary sanctions appeared, *prima facie*, "to be designed, at least in part, to punish and deter improper conduct." (14 F.3d at 543, app., p. 81a).

Hudson I stated the fines imposed upon petitioners would constitute " 'punishment' for purposes of double jeopardy analysis" unless they were determined to be " 'solely remedial', i.e., not serving deterrent or retributive ends." *Id.*, at 540, app., p. 80a.

The court of appeals remanded petitioners' cases to the district court for further fact finding. The district court was instructed to "determine the precise injury caused to the government for which the sanctions are the remedy. . . ." *Id.* If the district court determined that the sanctions imposed upon petitioners were not "solely remedial", it was instructed to dismiss the indictment. 14 F.3d, at 543; app., p. 81a.

D. The Opinion Of The District Court On Remand

Folowing remand from the court of appeals, the district court conducted an evidentiary hearing into the nature of the fines which have been imposed upon petitioners by the government. App., pp. 20a-68a.

The government's own evidence established that the fines had been imposed upon petitioners in order to serve as a deterrent to similar violations by petitioners and by

other persons similarly situated. The government's evidence also established that the amount of the fines imposed had been predicated upon a "penalty matrix". App., p. 13a. The "matrix" uses "points" to determine the severity of the sanction to be imposed in a fashion indistinguishable from the "matrix" of "points" employed in the Sentencing Guidelines promulgated by the United States Sentencing Commission. *See, Nichols v. United States*, 511 U.S. 738, 744 & nn. 2-3 (1994).

The factors considered are willfuness, number and duration of violations, concealment of violations and existence of prior violations.

The district court concluded that petitioners had been sanctioned by the government in order to prevent them " 'from ever reentering the banking industry and, through publicity of these actions, hopefully deter other individuals from similar conduct'."

The district court also found:

> The evidence also reflects that . . . when determining the amount of the penalty . . . the factors considered included intent, number of violations and concealment of violations. Injury to the government was not listed as a factor . . . [and] the evidence before the Court does not indicate that injury to the government was considered. . . .

879 F. Supp., at 1115-16, app., pp. 13a-14a.

The district court observed that while petitioners had negotiated a reduction in their fines, "no evidence suggests the reduction was related to an assessment of government losses." *Id.*

Indeed, the government concededly suffered no "loss" in the sense of parting with money or any other thing of value. OCC itself noted that all loan losses allegedly

resulting from petitioners' acts were borne by the lending banks.[6]

The district court acknoweldged that the government asserted that OCC had incurred "investigative costs" of approximately $72,000. There is, however, no statutory authority allowing OCC to collect "investigative costs" or to consider such "costs" in determining whether to impose monetary sanctions, and OCC acknowledged that it had not done so in imposing fines upon petitioners. App., p. 13a-14a.

These "costs" were, in fact, merely an arbitrary fraction of the salaries paid in the ordinary course to OCC employees who had been assigned to the investigation of petitioners. App., pp. 38a-39a.[7] The idea of claiming a fraction of salaries paid to OCC employees as a "cost" attributable to petitioners originated with the Assistant U.S. Attorney who was preparing for the hearing before the district court. (*Id.*, app., pp. 38a-39a).[8] In any event, the district court found as a fact that "the record contains no indication that these costs were considered by the [government] in determining the recommended fines. . . ." After considering this evidence, the district court concluded that "the fines were punitive for double jeopardy purposes." 879 F. Supp., at 1116, App. p. 14a. Accordingly, consistent with the mandate of *Hudson I*, the district court ordered the indictment dismissed.

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[6] OCC alleged the losses were incurred by the First National Banks of Tipton and Hammon, Oklahoma. App., p. 97a. Petitioners strongly dispute the allegation. The point is, on OCC's own version of events, the losses did not fall upon the government.

[7] The OCC representative who testified before the district court stated that he "took [my] salary and divided it by what I thought was the percentage of time that I had spent on the case. . . ." App., p. 89a.

[8] The OCC representative did not even know "why he [the Assistant U.S. Attorney] wanted [the information]." App., p. 38a.

E. The Second Opinion Of The Court Of Appeals

On the government's appeal, a differently constituted panel of the court of appeals again reversed the district court. *Hudson II*, 92 F.3d 1026, app., pp. 1a-8a. *Hudson II* summarily held that "there was no gross disproportionality between the total fines imposed [upon petitioners], $44,000, and the proven damages to the government, $72,000." 92 F.3d, at 1029; app., p. 4a. This holding was, as the district court which heard the evidence had stated, contrary to the government's own evidence on both points mentioned.

First, the total fines imposed upon petitioners were $100,000 upon Mr. Hudson and $50,000 upon both Mr. Baresel and Mr. Rackley. Although these fines were subsequently reduced, in the words of the district court, "the evidence reflects that the reduction was based upon the defendants' respective financial circumstances." 879 F. Supp., at 1116; app., p. 14a.

Second, the $72,000 figure was not contended by OCC to constitute "damages". Rather, it was said to be "costs" concededly derived by simply ascribing to petitioners a fraction of salaries paid to OCC employees involved in the investigation of petitioners.

The Tenth Circuit did not mention the fact that there was no statutory authorization for imposing such "costs" upon petitioners or the fact that any losses attributable to petitioners' alleged violation of federal banking statutes would fall upon the banks involved rather than any agency of the government. Nor did the court mention that the banks which OCC asserted had been injured would not receive any portion of the fines imposed.[9]

Instead, the court stated, since the money sanctions were not "overwhelmingly disproportionate" to the gov-

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[9] The fines were ordered to be paid to the United States Treasury. App., p. 180a.

erment's "damages", they were "remedial" as a matter of law.

The court deemed irrelevant OCC's concession that it had not considered this issue in determining the amount of petitioners' fines. Indeed, the court held that the "intent" which motivates a governmental agency to impose fines, or other sanctions, has no bearing on the question whether "punishment" is involved. 92 F.3d, at 1029, app., p. 6a. On this basis, the court of appeals—without questioning the factual findings made by the district court—reversed its judgment.

Petitioners' petition for rehearing, and suggestion of rehearing *en banc*, were denied. Petitioners seek review in this Court.

REASONS FOR GRANTING THE WRIT

I. The Holding Of The Tenth Circuit That *In Personam* Civil Penalties Imposed For The Purpose Of Deterrence May Be Deemed "Remedial" By Reference To Consideration Of "Investigative Costs" Is Contrary To Decisions Of This Court And Conflicts With Decisions Of Other Courts Of Appeals.

Perhaps the most compelling reason for granting review of the decision of the Tenth Circuit was stated by the Seventh Circuit in explaining why the latter refused to follow it, even though this resulted in a conflict among the circuits on an important question of constitutional law: the holding of the Tenth Circuit distorts Double Jeopardy Clause jurisprudence beyond recognition by confusing the very distinct concepts of providing a remedy to the government when it has suffered an injury and providing compensation to the government when it is simply investigating alleged violations of law. In the words of Judge Easterbrook:

> Although recovery of the costs of investigating . . . from [the target of the investigation] may be *compensatory*, in the sense that the United States then breaks even in the business of prosecuting wrongdoers, it cannot be *remedial*, because the United States is not the injured party, and the fine produces no benefit for those who were injured—except through general and specific deterrence, the standard objectives of the criminal law.

S.A. Healy Co. v. Occupational Safety and Health Review Commission, 96 F.3d 906, 910 (7th Cir. 1996) (emphasis original).[10]

The Seventh Circuit added that, were the view advocated by the government in *Healy*—and endorsed by the Tenth Circuit—accepted, "there is not much left of the double jeopardy clause." *Id.*

Nor would there be much left of the opinions of this Court in *United States v. Halper*, 490 U.S. 435 (1989) and *Montana Department of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994).

Halper involved the False Claims Act. The "false claims" with which the Act is concerned are false claims knowingly made to an officer or agency of the United States in order "to get a false or fraudulent claim paid or approved" for payment *from the Treasury*. 31 U.S.C. § 3729(a). In any such case, the government is itself the victim of fraudulent conduct and the wrongdoer's gain is always at least equaled by the government's loss.

Congress has directed that, in such cases, the United States should be provided with the remedy of double damages, a $2,000 penalty and costs of suit. The *Halper* Court was careful to note that

> the *remedial* provision of the Act state[s] that a person in violation 'is liable to the United States government for a civil penalty of $2,000, an amount equal

[10] The Seventh Circuit noted that "[b]ecause this opinion creates a conflict among the circuits, it was circulated before release to all judges in active service. . . . A majority did not favor a hearing *en banc*. . . ." 96 F.3d, at 911, n.*

to two times the amount of damages the government sustains because of the act of that person, and costs of the civil action'.

Halper, 490 U.S. at 438 (*quoting*, 31 U.S.C. § 3729; emphasis supplied). In a case such as *Halper* there is no doubt that the government is entitled to be "made whole" —making the government "whole" is the animating purpose underlying the statute.

The question in *Halper* was, therefore, one of degree: after a criminal prosecution has been completed, at what point in a separate civil action does the $2,000 penalty for each false claim become punitive? The Court's answer—when collecting additional money from the defendant is no longer "rationally related to the goal of making the Government whole" (*Id.*, at 451)—is simply irrelevant in a case in which the government is not itself the victim of the alleged misconduct and the fines imposed do not inure to the party who allegedly incurred a loss. This diametric difference, and its importance to Double Jeopardy Clause analysis, is illustrated by *Kurth Ranch*. There, the Court rejected the claim that the tax at issue was remedial because, *inter alia*, "the formula by which [the State] computed the tax assessment would have been the same . . . regardless of whether it suffered any harm at all." 511 U.S. 767, ——; 114 S.Ct. 1937, 1948.

As the Seventh Circuit recognized in *Healy* (and as the Tenth Circuit had itself recognized in its first opinion in petitioners' cases), the relevant inquiry for Double Jeopardy Clause analysis "is not whether [a] statute is designed to serve a remedial or otherwise beneficent purpose, but whether it achieves this end by the imposition of punitive sanctions". *Healy, supra*, at 911. *Accord, Hudson I*, 14 F.3d, at 542. When, as in petitioners' cases, the government does not even contend it is a victim of wrongdoing but, nevertheless, imposes *in personam* fines for the stated purpose of deterring alleged misconduct,

the sanctions constitute punishment. The contrary holding of the court below is inconsistent with *Halper* and *Kurth Ranch*; has now been expressly rejected by the Seventh Circuit; and should be reviewed by this Court.

The completeness of the conflict between the decision below and the decision of the Seventh Circuit in *Healy* is emphasized by the differing treatment which those courts gave to the decision of the Sixth Circuit in *United States v. WRW Corp.*, 986 F.2d 138 (6th Cir. 1993) (criminal and civil fines, separately assessed, imposed under the Federal Mine Safety and Health Act) and the Seventh Circuit's own previous decision in *United States v. Furlett*, 974 F.2d 839 (7th Cir. 1992).

The court below endorsed both decisions and relied upon them as authority for its holding. 92 F.3d, at 1029-30, app., pp. 7a-8a.

By contrast, *Healy* observed that *WRW* had dismissed this Court's decision in *Halper* as "an insignificant blip". 96 F.3d, at 910. But, the Seventh Circuit wrote, *United States v. Ursery*, —— U.S. ——, 116 S.Ct. 2135 (1996) "shows that *Halper* displaced older approaches and is now the point of reference. . . . We think that the sixth circuit's [decision in *WRW*] is inconsistent with *Ursery*". *Id.* As to *Furlett*, the Seventh Circuit observed that the respondent in that case had "conceded this issue" while *Healy* contested it, "and now that the issue is squarely presented we hold that under *Halper* a fine can be punishment even though it is less than the costs of investigation and prosecution." *Id.*

The conflict between the decision of the Tenth Circuit below and the decision of the Seventh Circuit in *Healy* is, in a word, absolute.

II. The Holding Of The Tenth Circuit That A Civil Fine Can Be Deemed "Remedial" By Reference To "Costs Of Investigation" Even Though Consideration Of Such Costs Is Neither Authorized By Statute Nor Undertaken By The Agency Imposing The Fines Is Contrary To Decisions Of This Court And Conflicts With The Decisions Of Other Circuits.

The statutes under which petitioners were sanctioned contain no authorization to consider the government's "costs" in determining whether fines should be imposed or the amounts of any such fines. The factors which OCC is authorized by statute to consider, and which it in fact considers, in imposing fines—duration and seriousness of the alleged violations, history of previous violations and ability to pay—all relate to the stated goal of deterrence, not to providing recompense to the government. As petitioners noted above, OCC readily acknowledged this point before the district court and acknowledged also that no attempt was made to even approximate "costs of investigation" until the idea was suggested to OCC by the government attorney preparing for the evidentiary hearing ordered by the court of appeals in *Hudson I*.

Yet in *Hudson II*, the court of appeals transformed government counsel's *post hoc* suggestion to OCC regarding "costs of investigation" into "proven damages [*sic*] to the government [of] $72,000." 92 F.3d, at 1028, app., p. 4a. These "proven damages" rendered the fines "remedial" without regard to the fact that the supposed "damages" were simply fractions of salaries of OCC employees who were involved in the agency's investigation of petitioners; without regard to the fact that no statute authorizes OCC to consider such costs in imposing fines; and without regard to the fact that OCC did not do so.

The principal authority relied upon by the court below was *United States v. Bizzel*, 921 F.2d 263 (10th Cir. 1990). *Bizzel*, however, only reinforces the importance of the distinction, emphasized in *Healy* and ignored below,

between a monetary sanction which is remedial and one which is not. The defendant in *Bizzel* had previously paid a money sanction as a remedy for fraud which caused *direct* monetary injury to an agency of the government, the Department of Housing & Urban Development ("HUD"). Indeed, the lead offense charged in *Bizzel* was "conspiracy to *defraud the United States* and HUD." 921 F.2d at 265 (emphasis supplied).

The similarity to, and irreconcilable conflict between, the holding below and the holding of the Seventh Circuit in *Healy* on this significant constitutional issue is truly striking. Like the Tenth Circuit, the Seventh Circuit confronted a monetary fine imposed under a statute containing "specific criteria, none of which concerns the costs of investigation and prosecution". 96 F.3d, at 910. In contrast to the decision below, the *Healy* court held that such a fine is "[a] penalty designed to deter wrongdoing [and] is punishment." *Id.*, at 910-911.

No decision of this Court and, so far as we are aware, no reported decision of any lower federal court other than the decision of which review is here sought, suggests that the government's "costs of investigation" can render an *in personam* civil fine "remedial" when consideration of such costs is neither authorized by statute nor undertaken by the agency imposing the fines. The decision of the Tenth Circuit is inconsistent with controlling decisions of this Court and in direct conflict with the decision of the Seventh Circuit in *Healy*. For both reasons, it should be reviewed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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